

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

1/31/78
77-1311

To be argued by
JOSEPH P. HOEY

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

UNITED STATES OF AMERICA,

Appellee,

against

SOL RAUCH, MARC RAUCH, LAWRENCE CORSA,

Defendants-Appellants,

and

MARVIN URBAN, a/k/a "MARTY GORDON",

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT SOL RAUCH

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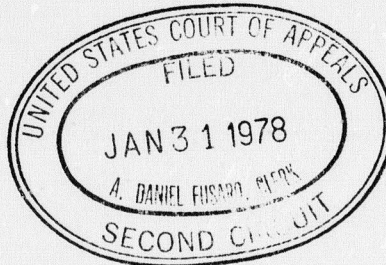


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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-1311

UNITED STATES OF AMERICA,

against

Appellee,

SOL RAUCH, MARC RAUCH, LAWRENCE CORDA,
Defendants-Appellants,
and

MARVIN URBAN, a/k/a "MARTY GORDON",
Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF SOL RAUCH

INTRODUCTORY STATEMENT

This is an appeal from the final judgment of the United States District Court for the Eastern District of New York (Pratt, D.J.), entered July 7, 1977 after a jury trial convicting the defendant-appellant, Sol Rauch, of 14 counts of mail fraud (18 U.S.C. 1341,

and 2).^{*} According to the Clerk's record, Sol Rauch was convicted on Counts 1 through 6 and 8 through 15 [A-4]. However, the stenographic record makes no reference to any finding by the jury in regard to Count 3 [A-].

Sol Rauch was sentenced to three years and a \$1,000 fine on each count to run concurrently. He is free on bail pending this appeal.

Convicted with Sol Rauch were his son, Marc Rauch and his son-in-law, Lawrence Corsa.

Originally the defendants had been indicted by a grand jury in the Eastern District of New York on Counts 1 through 10 under Title 18 U.S.C., Section 1341 and on Counts 11 through 15 under Title 15, U.S.C., Sections 77q(a) and 77x and Title 18 U.S.C. 2. On March 1, 1977 during a pretrial conference, at the urging of the court, it was agreed that the Security Law violations

^{*}By permission of the court, the present appeal--and the appeals of the two co-defendants (infra) are being prosecuted on the original papers in the certified record of appeal. Reference to the trial testimony and other items in the certified record appear herein as "R. ...". Reference to material published in the appendix appear herein as "A. ...".

contained in Counts 11 through 15 of the indictment be superseded by an information charging violations of Title 18 U.S.C. 1341 and 2.

Prior thereto the defendants made pretrial motions to vacate the indictment on the basis of insufficient evidence to sustain the indictment and of prosecutorial misconduct. The court deemed these motions to be made to include not only the indictment but also the superseding information and then denied the motions. At the conclusion of the government's case the defendants moved to dismiss the information which motions were denied by Judge Pratt with the caveat that the denial as to the defendant, Sol Rauch, was troublesome.

Each defendant has appealed from the denial of his motions and from the judgment of conviction entered by the District Court on the jury's verdict.

STATEMENT OF FACTS

The appellant is an attorney duly licensed to practice law in the State of New York, and the father of the appellant, Marc Rauch, as well as the father-in-law of the appellant, Lawrence Corsa.

"Federal Coin Reserve, Inc." ("FCR"), a New York corporation sold rare coins for the purpose of investment, until the Securities and Exchange Commission secured a federal court injunction terminating its solicitations on the ground that the purchase orders were unregistered "investment contracts" within the meaning of the securities laws. (Securities & Exchange Commission v. Brigadoon Scotch Distributors, Ltd., 388 F.Supp. 1288 (S.D.N.Y. 1975)). In December 1973, the stock of FCR was transferred to the co-appellants. Saul Rauch had no interest therein, and was never an officer, director or employee.

FCR was organized and operated for the purpose of acquiring and selling rare coins to persons interested in acquiring coins for growth purposes. In furtherance of its operation, salesmen were

employed on a commission basis to solicit purchasers by use of the telephone and the mails.

FCR was organized as an off shoot of Hartford Chemical Corporation, and occupied offices in the same building as Hartford. Originally FCR was operated by one Herman Weinstein, now deceased, and Paul Lipton, who prepared one of the principal exhibits in this case-Government Exhibit I, a white brochure. In November 1973, Herman Weinstein resigned as a principal of FCR, to devote time to other investments. At this point, Marc Rauch and Lawrence Corsa joined the company.

During this entire period of time, from November 1973 to December 12, 1974, the operations of FCR were handled exclusively by Marc Rauch and Lawrence Corsa. It is the government's contention that Sol Rauch, the appellant herein, the father and father-in-law, was the motivating factor in setting up this situation, and in directing and controlling the activities of the son and son-in-law for the purpose of perpetrating the fraud.

As part of the evidence of the government's case, they offered two witnesses who were purchasers or proposed purchasers of coins. One Barbara Wisnewski, who testified that she had one contact on the telephone with a person who alleged that he was the appellant herein, as attorney for FCR and who promised to contact her in regard to the coins about which she was inquiring. Contact was made by a representative of FCR who stated that a letter was being mailed to Ms. Wisnewski, which she received on the following day. The other contact was with one Joseph Pieronni, who testified that he had contact with others in the corporation and had no contact with Sol Rauch prior to December 30, 1974, when he met him in the United States District Court for the Southern District of New York, on the hearing for the restraining order. At that time, he was approached by Rauch who inquired as to the difficulties he was having with Rauch's son, Marc, and who then offered to assist Pieronni in having his \$5,000.00 returned to him. An appointment was apparently made

for the following week, which was cancelled after Pieronni testified. However, prior to testifying, Pieronni was advised, by a caveat from Rauch, that any agreement or understanding was not to in any way influence his testimony.

The other incident connecting Sol Rauch with the matter was that testimony of the travel agent who advised that he solicited travel arrangements for not only Hartford Chemical and other corporations, but also from FCR, but was advised that all arrangements and payments for that had to be cleared through and guaranteed by Sol Rauch.

Al Cito, the general manager of the FCR, testified that the three appellants herein maintained a private office, that he attended several meetings at which Sol Rauch apparently presided in that office, but that he did not know what part of the operation was handled by Sol Rauch, but that he knew that the entire operation was run and controlled by Marc and Larry. That is the entire government's case concerning the defendant Sol Rauch.

In the defense of the action, after motions had been denied, Sol Rauch testified that he was only peripherally involved in the activities of FCR because Herman Weinstein had died in the meantime, and that he was involved in the termination of an operation called Brigadoon Scotch, which had been his main activity, that he did not, nor ever acted as a principal, although he had been a fund raiser for FCR and had acted as their attorney. He did not participate in the formation of FCR, nor in the transfer of any of the stock in the company. The appellant, Sol Rauch, was not enjoined by the District Court in the S.E.C. v. Brigadoon, Supra. for any activities relating to F.C.R.

POINT I

THE COURT MATERIALLY AMENDED THE
INDICTMENT IN VIOLATION OF THE
DEFENDANTS' CONSTITUTIONAL RIGHTS

The grand jury charged that the appellant, Sol Rauch, aided and abetted the co-defendants under Counts 1 through 10 with violations of Title 18 U.S.C., Section 2 and 1341 (mail fraud) and under Counts 11 through 15 with violations of Title 15 U.S.C., Section 77q(a) and 77x (violations of the Securities Act of 1933).

On the eve of trial, at a pretrial conference, the court strongly urged the defendants to consent to the substitution of mail fraud charges on Counts 11 through 15 in place and instead of the Securities Act charges [A-91-109].

"The amendment of an indictment always presents a serious issue by virtue of the Fifth Amendment requirement of a presentment or indictment by a grand jury, and the Sixth Amendment requirement that an accused shall enjoy the right to be informed of the nature and cause of the accusation. Because of the constitutional provisions mentioned, it has become settled law in the federal courts that an indictment may not be amended except by resubmission to the grand jury unless the change is merely a matter of form and not substance. Ex Parte Bain, 121 U.S. 1 (1887); Stirone v. United States, 361 U.S. 212 (1960);

and Russel v. United States, 369 U.S. 749, 770 (1962)." Stewart v. United States, 395 F.2d 484, 487 (8th Cir. 1968).

The Assistant United States Attorney expressed the desire to present the evidence on Counts 11 through 15 of the indictment at the trial even though the charges might well be dismissed at the completion of the government's case [A-94]. However, in response to the recommendation of the court, the Assistant United States Attorney agreed to prepare and file a superseding information deleting the grand jury's charges on Counts 11 through 15 and substituting five counts of mail fraud. The court assured counsel that this was a change in form, rather than substance, since the maximum sentence was the same [A-94] and the additional charges were lesser included counts in the grand jury's indictment. The court's erroneous and persuasive advice came on March 1, 1977, just two weeks after it had advised the appellant, Sol Rauch, an attorney who obviously lacked trial experience, to secure independent counsel. In spite of the court's opinion that the securities charges were essentially the same as the mail fraud charges, the two

crimes are separate and distinct. In *United States v. Cashin*, 281 F.2d 669, 673-674, (2nd Cir. 1960) this court states that:

"The gist of the crimes charges in the indictment, as in most Securities Act cases, is the fraudulent scheme employed in the sale of securities. See *United States v. Robertson*, D.C.S.C.N.Y. 1959, 181 F.Supp. 158; *United States v. Monjar*, supra. The purpose of the requirement that there be a use of the mails or other facilities of commerce is solely to create a basis for federal jurisdiction. *Creswell-Keith, Inc. v. Willingham*, 8 Cir. 1959, 264 F.2d 76; *Schillner v. H. Vaughan Clerke & Co.*, 2 Cir. 1943, 134 F.2d 875; *United States v. Robertson*, supra. The use of the mails need not be central to the fraudulent scheme and may be entirely incidental to it. See, e.g., *Kopaid-Quinn & Co. v. United States*, 5th Cir. 101 F.2d 628, certiorari denied sub nom. *Ricebaum v. United States*, 1939, 307 U.S. 628....

...The purpose of the mail fraud statute is to protect against the 'use of the United States mails in furtherance of *** (the) scheme.' *Holmes v. United States*, 8 Cir. 134 F.2d 125, 129, certiorari denied 1943, 319 U.S. 776, 63 S. Ct. 1434, 87 L.Ed. 1722, while the evil at which the Securities Act is directed is the fraud in the sale of the securities."

See, also: *United States v. Sanders*, 266 F. Supp. 615, 618 W.D. La. (1967) affirmed 415 F.2d 621 (5th Cir. 1969) cert.den. 397 U.S. 976; *McDaniel v. United States*, 343 F.2d 785 (5th Cir. 1965).

The superseding information, alleged in Counts 1 through 5 that "Commencing in or about November 1973, and continuing thereafter until at least December 12, 1974, the exact dates being unknown to the grand jury, within the Eastern District of New York..." (emphasis supplied) that the defendants did "...knowingly and willfully devise and intend to devise a scheme and artifice to defraud..." In support of Counts 6 through 15, the opening introductory paragraph states, "The Grand Jury incorporates by reference and realleges herein all of the allegations contained in paragraphs 1 through 7 of Counts 1 through 5 of this superseding information." (Emphasis supplied.)

The defendants consented, signed waivers and were prosecuted on the so-called superseding information. Although brought under the authority of the United States Attorney, the superseding information recites that the grand jury was the accusatory body, in spite of the fact that: (1) the grand jury never deliberated on this document as a true bill; (2) the foreman of the grand jury never signed it; and (3) the grand jury never issued this document as a true bill.

This "superseding information" named Urban, a/k/a Gordon, as a co-defendant on all counts in spite of the fact that: (1) on February 23, 1977 the court granted him a severance on the indictment; (2) he never consented to an alteration of the indictment; (3) he never consented to the procedure; (4) the prosecutor knew that a Postal Inspector would testify as to representations made by Marvin Urban which testimony would be crucial on the issue of misrepresentations by the defendants; and (5) the court and prosecutor knew that the court would have to instruct the jury not to consider the innocence or guilt of Mr. Urban.

The court recognized that it was fixing up and amending an indictment rather than substituting a new accusatory instrument, when it placed on the record the understanding of the court and both sides that a hearing held as to prosecutorial misconduct in obtaining the indictment would be applicable to the so-called superseding information [A-109]. The indictment was not dismissed on the filing of the amended document, but only after the court imposed sentence on each of the defendants. In its charge to the jury, the court substituted

the words "United States Attorney" in place and stead of the references to the grand jury contained in the document entitled "Superseding Information" (A-43, 54, 55] without the motion which is required for such amendment of an information (Fed. R.Crim.Proc. 7[E]).

An indictment cannot be amended by the court. It must be re-submitted to the grand jury for amendment. An attempt to amend an indictment without grand jury action results in a prosecution based on an accusatory instrument not returned by the grand jury and is, therefore, violative of the Fifth and Sixth Amendments. In re Bain, 121 U.S. 1.

An indictment may not be amended, even with the consent of the defendant. Carney v. United States, 163 F.2d 784, 789 [9th Cir. 1947].

In United States v. McGrath, 558 F.2d 1102-1105 (2nd Cir. 1977) this court permitted an amendment to an indictment by the same grand jury which voted the original indictment even over the objections of the defendant.

It is the settled rule in federal courts that an indictment may not be amended.

"To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." (citing Orfield, Criminal procedure from arrest to appeal, 243).

Russell v. United States, 369 U.S. 749.

The counts of this indictment related to infamous, but not capital, criminal acts and hence required an indictment, absent an intelligent waiver (Fed.R.Crim.Proc. 7(b)). But even in cases where the prosecutor could have proceeded initially by information, but chose to present the case to a grand jury, he is bound by the grand jury procedure thereafter and may not amend without re-presentation to the grand jury. The prosecutor has gained the advantage of a grand jury proceeding in using its subpoena powers and the petit jury was made aware of the fact of an indictment, which is a subtle stigma upon a

defendant. *United States v. Fischetti*, 450 F.2d 34 (5th Cir. 1947) cert.den. 405 U.S. 1016; *United States v. Goldstein*, 502 F.2d 526 (3rd Cir. 1974).

An information, knowingly and intelligently consented to, and which is not actually an amended indictment, *Beardslee v. United States*, 541 F.2d 705, 706, (8th Cir. 1976) may be consented to in lieu of an indictment in the first instance, pursuant to Fed. R. Crim. Proc. 7(B). But here the information on its face was supposedly laid by the grand jury and the circumstances surrounding its use raises grave questions as to the true nature of the instrument. Unlike an indictment, an information may be amended under Fed. R. Crim. Proc. 7(E). There is no such procedure available for an indictment.

It is not necessary that there be a physical change in the indictment in order to deprive the court of jurisdiction. An indictment may be changed in effect, or it may be amended in effect, by the action of the court, such as a direction to the jury to disregard surplus as contained in the indictment, or to add language not contained in the indictment. *Russell v. United States*, supra; *Stirone v. United States*, 361 U.S. 212;

United States v. Norris, 281 U.S. 619; In re Bain, supra. Although an inconsequential amendment may be allowed, it is never allowed for a change which alters the crime charged. Smith v. United States, 360 U.S. 1.

The attempted amendment of an indictment is jurisdictional and may be raised at any time. In re Bain, supra.

The action of the Court amending the indictment in violation of defendant's right requires a reversal.

POINT II

PLAIN ERROR WAS COMMITTED BY
THE COURT IN REFUSING TO DIS-
CHARGE ITS OBLIGATION TO
RESPOND TO A REQUEST FROM THE
JURY FOR FURTHER INSTRUCTIONS
CONCERNING AN ESSENTIAL ELE-
MENT OF THE CRIME CHARGED.

In every criminal case, it is incumbent upon the government to prove every essential element of the offense charged, and defendants are entitled to acquittal unless the government establishes their guilt beyond a reasonable doubt. This places a burden not only upon the government, but also upon the court. The court's burden is to instruct the jury on the law to be applied to the evidence adduced at trial. The court can only discharge this duty by carefully instructing the jury on the law and in not permitting a troubled jury to rely on a layman's interpretation of superficially simple, but actually difficult legal issues as to whether a defendant did "...knowingly and willfully...devise and intend to devise...a scheme and artifice to defraud." *United States v. Bolden*, 514 F.2d 1301, 1309 (D.C. Cir. 1975);

Powell v. United States, 347 F.2d 156 (9th Cir. 1965);
Bland v. United States, 299 F.2d 105, 109 (5th Cir. 1962).

A proper discharge of the jury's responsibility directly depends upon the proper discharge of the judge's duty to give the jury the required guidance by a lucid statement of the relevant legal criteria for determining a defendant's guilt or innocence. When a jury makes explicit its difficulties, a trial judge must clear them away with concrete accuracy.

"Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria." Bollenbach v. United States, 326 U.S. 607, 612 (1946)

See, also United States v. Bolden, supra; Wright v. United States, 250 F.2d 4 (D.C. Cir. 1957).

The fact of the inquiry indicates that the initial charge left the jury, or at least one juror, unsure of the relevant legal criteria to be applied to the evidence in arriving at a verdict. Powell v. United States, supra; United States v. Bolden, supra.

In this case, the court charged the jury on Friday afternoon, April 8, 1977, after which it retired

deliberate at 3:35 P.M. (A-27 - 77). One hour and forty-five minutes later, at 5:20 P.M. the jury requested, in writing, additional instructions (A-78). Initially the court experienced difficulty in reading the jury's handwriting beyond the word "willfully", (A-78 - 80), and summoned the jury to the courtroom at 5:25 P.M. when he was told that the jury was confused on "knowingly and willfully devise and intent to devise" (A-81 - 82). The jury informed the court that it required a definition of the terms "willful and intent" within the context of the superseding information. The prosecutor, counsel for the co-defendants, and this appellant requested that the court issue charges responsive to the jury's inquiry. (A-84, 85).

The court agreed to furnish the jury with additional instructions (A-81), but postponed its instruction and recessed at approximately 5:32 P.M. until 9:00 A.M. on Monday, April 11 (A-85). The jury received no admonition against attempting to define or interpret on their own, those elements of the crime during the course of the recess or at any other time. (A-82 - 84 - 86).

At 9:00 A.M. on Monday, April 11, the court, upon reconvening, decided that he had again become confused as to the jury's request and decided not to answer the jury's question in its "present form" (A-87 - 88), despite the unequivocal explanations by jurors one and five on the previous Friday afternoon as to the meaning of their inquiry (A-81). Instead, the court instructed the jury to restate its request in writing, after which it was instructed to continue deliberations (A-87, 88 and 90). The court reconvened at 2:00 P.M. when the jury requested the Court to "forget our request for explanation..." and thereupon, promptly returned with a verdict of guilty against the defendants on the Superseding Information (A-90).

Prior to the verdict, the appellant, requested that the court ascertain the details of the jury's withdrawal of its request. The court denied the application (A-90).

The law in this Circuit, as well as in other Circuits, is that the decision whether and how to reinstruct a jury is within the sound discretion of the

court. Of necessity there are limitations and restrictions on the exercise or refusal to exercise that discretion.

The United States Court of Appeals, District of Columbia Circuit, in *United States v. Bolden*, supra, pointed out one such instance. After approximately one and one half hours of deliberation, the jury sent the District Court Judge three questions.

In reversing and remanding the conviction, the Circuit Court stated:

"While the judge did treat the question of an accidental killing by the appellants, the problems raised by question one were not resolved by the court's further charge. When the court refused to do anything more than reread the statute and the standard instruction, despite cogent requests from the jury and both government and defense counsel, it could well have left the jury with the incorrect impression that coincidence was sufficient to convict. The standard instruction may be sufficient in the first instance on this issue (although modification where an 'afterthought' defense has been presented would not be error), but the jury's request called for a further explication of the law on this point." Id 1308.

In *Wright v. United States*, supra, which involved a conviction for second degree murder, a question was

raised by the jury concerning the Durham instruction which was submitted to the court after several hours of deliberation. One juror asked for further instructions as did defense counsel but the court refused further instruction. Defense counsel also requested further instructions embodying the juror's requests which was also denied.

In vacating the conviction and remanding that count, the United States Court of Appeals, District of Columbia Circuit, held that:

"The refusal to answer the juror's question and the denial of the requested instruction constitute reversible error. ...Where, as here, the need for more appears, it is the duty of the judge to fill in the sketch, as may be appropriate on the basis of the evidence, to provide the jury with light and guidance in the performance of its difficult task." Id 11.

In a like vein, the 9th Circuit reiterated the same principle in *United States v. Miller*, 546 F.2d 320, 323, 324 (1976). In that case on the second day of deliberations, the jury sent a note to the trial judge requesting him to reread all of the charges. The trial

judge declined, indicating that rereading the charge would be too time-consuming. In a note to its decision, the 9th Circuit stated that this:

"This seems of particular importance in this case where the jury had the entire weekend to forget the instructions. The record shows that the instructions were read to the jury on a Friday. The jury then deliberated until 5:00 P.M. at which time they were released for the weekend. They reconvened Monday morning at 9:30 A.M. This means that there was a minimum of 54 hours for their collective memories to dim. That they had become unclear as to the instructions is evidenced by the fact that later on Monday, as noted above, they asked the trial judge to reread all of the instructions over again."

The trial judge did, however, reread two instructions defining reasonable doubt and the difference between direct and circumstantial evidence. After the reading, the judge asked the jury whether this clarified their problems. The foreman indicated that there was one other question which dealt with credibility. The trial judge reread his previous instructions with one major exception -- the cautionary instructions as to the weight to be afforded to an accomplice's testimony. After giving the incomplete instructions, the trial judge sent the

jury back to deliberate. An objection was taken by counsel who moved for mistrial. This motion was denied. In reversing and remanding, the 9th Circuit held that:

"...It is our firm belief that at this time the trial judge could easily have recalled the jury, given the remainder of the credibility instruction, and sent them back to deliberate again. This would have taken a minimum of court time, while protecting the defendant's right to a properly instructed jury." Id. 324.

In *Powell v. United States*, *supra*, a case involving title 18 U.S.C. Section 2421, an interstate journey was admitted by an appellant who was convicted of transporting a girl from Texas to Arizona for the purpose of prostitution. The case was tried on a similar issue as the one in this case, namely, intent. The jury retired at 4:12 P.M. and requested further instructions at 8:40 P.M. The court reread part of the charge and directed the jury to return and deliberate. The Court of Appeals, in reversing and remanding the conviction, stated:

"The meaning of the jury's inquiry was uncertain. All that the inquiry made clear was that the jury was confused as to the legal standards to be applied in resolving the central factual issue upon which defendant's guilt or innocence depended. The court made no effort to discover the nature of the jury's

misunderstanding. Instead, the court assumed, despite its own doubts, that the jury meant to ask whether the requisite wrongful purpose could be inferred from evidence of conduct subsequent to the interstate journey. The court therefore reread an instruction which it had previously given on this subject. But it would seem just as likely that the jury meant to ask whether the defendant would be guilty of the offense charged if the wrongful intent were first conceived after the couple arrived at their destination. The court did not repeat its prior instructions on this subject. Moreover, the instruction was given, if taken as an answer to second possible meaning of the jury's inquiry, might well have led the jurors to suppose that a wrongful purpose conceived following the journey would suffice. Thus, the court's response may have led to the application of a standard which was wholly improper." Id. 157.

The judge in the instant case did not attempt either to give a supplemental charge or take any steps to ascertain whether the jury understood or had proper knowledge of the relevant legal criteria to apply in its deliberations. A trial judge has "...no business to be 'quite cursory'..." in circumstances where the jury asked for supplemental instruction. *Bollenbach v. United States*, *supra*.

Within an hour and forty-five minutes on Friday afternoon, the jury conveyed its difficulties to the

trial judge. On Monday, after the weekend recess, the jury deliberated some 4-5 hours without any supplemental instructions, before requesting the court to forget its question and returning a verdict of guilty immediately thereafter. Apropos of this situation are the comments of the 5th Circuit in *Bland v. United States*, supra.

"It would strain credulity to suppose that the original instructions of four hours earlier, explaining the statutory elements of guilt, and adding the additional requisites of knowledge and intent were still fresh in the minds needed refreshing as to the terms of the statute, it is an inference so strong as to be conclusive, that the further instructions, explaining that knowledge must be proved, and raising the sole factual issue still in doubt under the evidence, had also by then completely gotten out of the minds of the jurors. The defendants were effectively stripped of their sole defense and conviction.

It is not beside the point to suggest that lawyers and judges, trained to follow language closely and to draw close distinctions as to its meaning, would themselves be at a complete loss to remember modifications of a forgotten rule of law. This, in essence, is the impossible task expected of twelve untrained laymen here. The fatal flaw is obvious and needs no further belaboring. The judgment must be reversed and remanded for this reason."

An Appellate Court may not substitute its judgment for that of a jury. The Supreme Court in *Bollenbach v. United States* clearly stated:

"In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be." *Id.* 615.

The jury here clearly requested the legal criteria necessary for its deliberation. This criteria was not forthcoming from the court. No attempt was made to ascertain whether the jury understood, had or was employing the correct legal criteria for its deliberations in determining willfulness and/or intent as charged in the "superseding information" and/or indictment. This is plain error requiring a reversal. This is not substituting the belief of the Appellate judges in the guilt of the accused but rather correcting plain and clear error.

Under F.R.C.P. 52(b) the court may notice plain error in charges even despite failure to comply with

F.R.C.P. 30. Powell v. United States, supra; United States v. Fields, 466 F.2d 119, 121 (2nd Cir. 1972).

POINT III

PROSECUTORIAL MISCONDUCT OF THE ASSISTANT
UNITED STATES ATTORNEY, COUPLED WITH THE
KNOWN WEAKNESS OF THE GOVERNMENT'S CASE
AGAINST SOL RAUCH, REQUIRED A REVERSAL

From the initial presentation of the case to the grand jury, through the presentation of the trial evidence, through the summation and at the sentencing, the government continually referred to defendant Sol Rauch as the prime defendant who deserved to be punished more severely than the other defendants. On the other hand, the indictment referred to him as an attorney and advisor and accessory under Sec. 2, U.S.C. Title 18 (A-5). The Assistant United States Attorney requested the Court to charge the law on as accessory as principal. The main thrust of Sol Rauch's defense was that he acted as an attorney and should not be held liable for the actions of his clients, the other defendants.

The Court recognized the weakness of the government's case against Sol Rauch, which depended

wholly upon circumstantial evidence (A-117). If Sol Rauch was to be believed, a proper application of the rule of circumstantial evidence would require an acquittal. Therefore, his veracity was of the utmost importance and the case against him pivoted upon his veracity and reputation.

With full knowledge of its effect upon Sol Rauch's defense, the government embarked on a deliberate course to besmirch his reputation and veracity before the grand jury which inducted him and the petit jury which tries him. The actions of the attorney for the government, more fully set forth, were contrary to the high standard which a prosecutor must meet.

"...When an Assistant United States Attorney appears in Court, and especially in a trial before a jury, he represents and personifies the government. He must prosecute cases diligently and vigorously. The public expects no less. But, he must also perform his task with dignity and self discipline. The public deserves no less." United States v. White, 486 F. 2d 204, 207 (2nd Cir. 1973)

The first step in the prosecutor's
misconduct occurred before the grand jury.

In a pretrial motion to dismiss the indictment, the defendants claimed prosecutorial misconduct in that the Assistant United States Attorney was alleged to have suppressed evidence and to have questioned Sol Rauch before the grand jury concerning a claimed Canadian criminal conviction when the Assistant United States Attorney knew, or should have known, that no such convictions existed.

The defendants claimed that they were tricked into waiving their rights not to testify. They testified before the grand jury and then, having been examined at the government's leisure, were not allowed to return as witnesses, although so promised by the Assistant United States Attorney, in order to present their side of the case. A hearing was held before the trial judge on February 10. On March 7, 1977 the Court denied

their motions to dismiss the indictment.

At the hearing the appellant said that he, Marc Rauch and Larry Corsa, appeared at the Assistant United States Attorney's office on February 20, 1976 when they learned that the case was about to be presented to a grand jury, and testified at the hearing that the Assistant United States Attorney induced Marc Rauch to appear before the grand jury, supposedly voluntarily, on the suggestion that he would gain favor in the eyes of the grand jury by appearing and showing himself to the grand jurors as a cooperative witness. In spite of this he was subjected to a lengthy and grueling examination. Each testified that Marc Rauch, who had knowledge of the facts, was promised by the Assistant United States Attorney that he would be permitted to testify at length as to the defense's position on March 5, 1976. However, after the others had testified on that date, he was not permitted to continue his testimony. The appellant testified that he would not have appeared before

the grand jury but for the promise that Marc Rauch would be allowed to return before the grand jury to testify on March 5, 1976.

On the other hand, the Assistant United States Attorney stated that a defendant does not have the right to appear before a grand jury, that he had only subpoenaed records and never expected or desired to call anyone before the grand jury, but admitted that the witnesses testified and that he never informed the grand jury that the witnesses were appearing voluntarily. Corsa's grand jury minutes clearly show that the Assistant United States Attorney had indeed purposely and designedly brought the defendants before the grand jury (pg. 36, grand jury March 5, 1976)

Mr. Woodfield's testimony was at direct variance with that of five witnesses. He told the court in both his affidavit in opposition to the motion to dismiss the indictment and in his testimony that he had never promised Marc Rauch that he

would be able to testify or that he would be returning to testify. When he was confronted with Rauch's grand jury testimony, which clearly indicated that he expected to be recalled, the Assistant United States Attorney was at a loss for an explanation. Clearly, the Assistant United States Attorney was not candid in his testimony.

The repeated and knowing reference to a non-existent Canadian conviction in order to destroy Sol Rauch's veracity:

Sol Rauch was charged in Ontario with fraud in relation to a sale of some mining stock, but the conviction was reversed on appeal and a not guilty verdict entered on direction of the appellate court. In the grand jury the Assistant United States Attorney questioned Rauch concerning the conviction in Canada, when in fact, no conviction existed (GJ-24-26). Clearly, it is reversible error to allow questioning about a non-existent conviction United States v. Semenshon, 421 F. 2d 1206 (2nd Cir. 1970). The Assistant United States Attorney

admitted that at the time he examined Rauch before the grand jury and destroyed his veracity by reference to a conviction, he did not then know (a) that he had been convicted and (b) that it had been reversed. His conduct before the grand jury was reprehensible as he was inquiring of a target of the investigation, whom he had tricked into appearing before the grand jury, about a conviction which he did not then know of his own knowledge existed and which he later admitted did not exist.

Not content with the damage to the defendant's reputation before the grand jury, and having admitted his error before the court, the Assistant United States Attorney then proceeded before the trial jury to repeat his reference to a conviction. In his summation, he referred to the appellant as having been twice convicted (R-3476), which could be, and was probably meant to refer to the Canadian conviction in a further attempt to destroy appellant's creditability. The effect on Sol Rauch was not minimal, it was fatal. *Berger v. United States*, 295 U.S. 78, 85; *United*

States v. White, Supra. In deciding the question, the court must consider the circumstances of the case, the degree of prejudice created in the minds of the jurors by the prosecutorial misconduct, the quality and forcefulness of the trial judge's corrective action and the strength of the government's case United States v. Pfingst, 447 F.2d 177, 183, [2nd Cir. 1973] cert.den. 412 U.S. 941.

The repeated references to Brigadoon Scotch:

The Assistant United States Attorney knew that appellant was involved in a business called Brigadoon Scotch, which firm operated out of the same quarters as Federal Coin Reserve. In fact, one of appellant's defenses was that he was only peripherally involved in Federal Coin Reserve as an attorney and that his main activities concerned Brigadoon Scotch. Although the government had not chosen to prosecute or charge anyone with misconduct regarding Brigadoon Scotch, the Assistant United States Attorney continually questioned him about Brigadoon Scotch before the grand jury and later before the trial jury, in an attempt to

imply that Brigadoon Scotch was some underhanded and illegal enterprise; the appellant's trips to the Bahamas on behalf of the Brigadoon enterprise were actually part and parcel of some offshore tax fraud where secret bank accounts were kept in a Nassau bank on behalf of appellant and other "conspirators". The prosecutor knew that Brigadoon was an investment in scotch whiskey supplies, but in order to excuse himself before the court as to his cross-examination of appellant before the grand jury concerning Brigadoon Scotch, he told the court that Brigadoon was brought in because it was a coin company and the grand jury was investigating the coin business (Feb. 10, 1977 hearing minutes, pg. 104). Then, on the trial the prosecutor questioned the defendants Brigadoon in an attempt to besmirch them with veiled innuendos as to that business. However, he did not claim that Brigadoon Scotch was a coin company before the trial jury.

The prosecutor's references to evidence
he had not produced in court:

In his summation to the trial jury, Mr.

Woodfield stated in rebuttal that he could have called 500 victims of the alleged fraud and not just the few who testified (A-122); that he had a list of over seventy customers who had been defrauded which he did not produce in court; that the government could have called 100 customers if it had chosen, and that as of November 1974, ninety two customers had not received their coins with the implication that the defendants intended that they would never receive their coins (A-123).

In his unseemingly zeal, the prosecutor produced a witness who had prepared a chart listing income received by and on behalf of Sol Rauch, Marc Rauch and Larry Corsa, which purported to show that each of the defendants had received equal amounts. The government well knew that the so-called income included expenses, and that in fact the defendants had not received equal amounts from the business

References to "lies" by the defendants:

In his summation, the Assistant United States Attorney made intemperate remarks about the defendants and in particular, this appellant. He stated that appellant, an attorney, attempted to buy testimony (R-3466); that appellant had lied to the jury when he

said that he was an attorney and a finder of capital (R-3474); that Marc Rauch's explanation as to return of money by the receiver appointed to operate Federal Coin Reserve was not true, that it was a like (R-3480).

The dignity of the court and of the office of the United States Attorney for the Eastern District deserve a higher standard of ethical conduct than that which was displayed in this case.

"The United States Attorney is the representative not of an ordinary party but of a sovereignty whose obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

It is fair to say that the average jury in a greater or lesser degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions

of personal knowledge are apt to carry much weight against the accused when they should properly carry none. The court below said that the case against Berger was not strong; and from a careful examination of the record we agree. Indeed, the case against Berger, who was convicted only of conspiracy and not of any substantive offense as were the other defendants, we think may properly be characterized as weak-- depending, as it did, upon the testimony of Katz, an accomplice with a long criminal record.

In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence. If the case against Berger had been strong, or, as some courts have said, the evidence of his guilt 'overwhelming', a different conclusion might be reached. (Citing cases)" Berger v. United States, 295 U.S. 78, 88, 89

The case against Sol Rauch was admittedly weak. The persistent attempt by the Assistant United States Attorney to project him before the jury as a major criminal, unworthy of belief, who had previously been convicted of a crime of fraud and was still engaged in other illegal and corrupt conspiracies, all of which were known to be untrue, or which the prosecutor did not know to be true,

constituted such prosecutorial misconduct as to require a mistrial and reversal. See: United States v. Gonzales, 488 F.2d 833 [9th Cir. 1973]; United States v. White, 486 F.2d 204 [2nd Cir. 1973]; United States v. Drummond, 481 F.2d 62 [2nd Cir. 1973]; United States v. Fernandez, 480 F.2d 726 [2nd Cir. 1973]; United States v. Miller, 478 F.2d 1315 [2nd Cir. 1973]; United States v. Freeman, 514 F.2d 1314, 1319 [D.C. Cir. 1975].

POINT IV

THE CUMULATIVE EFFECT OF ERRORS IN
THIS CHARGE AMOUNT TO PLAIN ERROR

The task of delivering as accurate and truly instructive charge to a jury has been recognized that:

"of foremost importance is the necessity for organizing and outlining governing legal principles in a logical sequence that will fairly inform the jurors of the essential rules to be applied by them in reaching their verdict. Certain principles, of course, are of such a standard and reoccurring nature that they should present no serious problem for the court in the average case. Others require more preparation and thought on the judge's part. Complex legalisms must be translated into simple prose that will be understandable by the average layman. The essential elements of the alleged crime or crimes and of any defenses raised by the defendant should be clearly described. Terms of legal significance should be defined in a way that will be understood." United States v. Clark, 475 F. 2d 240, 250 (2nd Cir. 1973).

It is of paramount importance that the court's instructions be accurate, precise, comprehensible and complete. Otherwise justice will not

be done in accordance with accepted legal principles. Holland v. United States, 348 U.S. 121, 138 (1954); United States v. Lodwich, 410 F. 2d 1202, 1204 (8th Circuit 1969).

The appellant who appeared pro se at the trial took no exception to the courts charge, and although an attorney, manifested incredible inaptitude in failing to do so, and in congratulating the court on a "fair charge" (A-75). His expression of general satisfaction with the charge was not a clear statement that error in particular instructions was being waived. United States v. Freeman, 514 F. 2d 1314, 1318 (D.C. Cir. 1975).

The errors in this charge go directly to the defendant's right to have the jury properly and fairly instructed. The errors are not a case of nit-picking over nuances. The cumulative effect of the errors in the charge was, in the words of Fed.R.Crim.Proc.#52,"plain" in that it affected "substantial rights" of the defendant on all counts and should be "noticed" although not raised below. United States v. Fields, 466 F. 2d 119, 121

(2nd Cir. 1972). United States v. Vaughn, 443 F. 2d 92
(2nd Cir. 1971)

A. WILLFUL AND INTENT

The court in charging the jury concerning Section 1341, Title 18, U.S.C. and Section 2, Title 18, U.S.C. deviated from the standard charge, the "information" and the exact language of the statute. Instead of instructing the jury in terms of "...knowingly and willfully devise and intend to devise..." (A-81) the court employed the terms "voluntarily and 'intentionally" (A-51, 52). While the substitution of these terms may not be at first blush of major significance, this transposition is of major import under the facts in this case, and it caused confusion in the minds of the jury as to the legal criteria to be employed (A78,87). An argument to the contrary cannot be made, since the jury returned with a request for further instructions albeit a fruitless request in light of the judge's failure to respond (A-78-83) and even the Assistant United States Attorney expressed doubt as to whether the Court had instructed

the jury on "knowingly" and "willfully" (A-83).

B. SPECIFIC INTENT

Although the court referred to the necessity of proving "specific intent", that term, which referred to the intent required to utilize the mails pursuant to a scheme to defraud was never defined for the jury, although it is an essential element of the charged crime. Absent clarification, the failure to define "specific intent", as well as "knowingly" and "willfully", caused confusion and may have left as erroneous impression in the minds of the jury. United States v. Clark, Supra., 248; United States v. Gillilan, 288 F. 2d 796, 797 (2nd Cir. 1961).

C. REASONABLE DOUBT

The court's charge on reasonable doubt is set forth in Appendix 30-32. The court does not define reasonable doubt in terms of an "abiding belief". The court defines reasonable doubt in terms of an "abiding conviction". The term conviction instead of belief is employed with a sufficient degree

of regularity (A-31) as to taint the charge and establish a consistent theme.

The court charged that reasonable doubt "is not caprice, whim, speculation, conjecture or suspicion. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant." (A-31)

A similar charge was given in *United States v. Barrera*, 486 Fed. 2d 333, 339. (2nd Cir. 1973) and *United States v. Magnano*, 543 F. 2d 431, 436, N4 (2nd Cir. 1976) with one substantial difference. The *Barrera* court employed the expression: "nor is it sympathy for any party." The *Magnano* court employed the expression "it is not sympathy for a defendant or a desire to uphold the government".

The court below has singled out the defendant. This act has been held to the error. *United States v. Cummings*, 468 F. 2d 274 (9th Cir. 1972), *United States v. Urbanis*, 490 Fed. 2d 384 (9th Cir. 1975), Cert. Denied 416 US 944.

The court's error in its reasonable doubt charge is further compounded by its statement that: "...reasonable doubt does not mean a positive certainty or beyond all possible doubt. If that were the rule, few persons, however guilty they might be, would be convicted. Since it's practically impossible for a person to be absolutely and completely convinced of any controverted fact..." (A-31,32). This language, "Few persons, however guilty they might be, would be convicted," has been held to be prejudicial error. *United States v. Bridges*, 499 F. 2d 179 (7th Cir. 1974), Cert. Denied 419 U.S. 1010.

The court's charge on reasonable doubt when taken as a whole, although similar to that in *United States v. Magnano, Supra.*, more than slightly favors the government. The charge when taken in its entirety is highly prejudicial to the defendants, for later in the charge on credibility the jury was instructed that the "defendant has a strong motive to lie". (A-67)

D. INFERENCE

The prosecutor inquired of the defendants regarding customers other than those named in each count. In its charge the court stated:

"with respect to the other names which Mr. Woodfield inquired about, however, you should disregard them altogether since no evidence has been presented that these individuals did not receive coins and you must decide the case only on the basis of the evidence which is before you." (A-34)

The court failed to charge the jury that they must disregard the other names completely since no evidence had been presented. Instead the court proceeded to give a defective charge as to inference.

The court defined the term "inference" as a "...conclusion which reason and common sense lead you to draw from the facts which have been established by the evidence in the case. Also it is for you, the jury, to draw whatever inference may be called for by the evidence." (A-34,35). This court has held that a charge which states "only one inference" may be drawn is error. *United States v. Clark, Supra.*, 250. The charge in this case is

deficient in that it fails to instruct the jury that it may refuse to draw an inference or may draw more than one inference.

E. THE "INFORMATION"

The court initially erred in its charge to the jury in reading the "information", an accusatory document which was not the document returned by the grand jury (A-37-44) and compounded the error by making additional changes to the "information" and the indictment. .

With reference to counts 1 through 5, the court stated: "commencing in or about November 1973 and continuing thereafter, until at least December 12, 1974, the exact dates being unknown within the Eastern District..." (A-39). The court deleted, after the word unknown, the actual language employed in the document. Those words deleted were "to the grand jury".

The court made an additional novation in the document when it stated: "it was further part of the scheme and artifice during the telephone

conversations with the potential customers and in promotional materials mailed to them, among other things, the following false and fraudulent pretenses, representations and promises would be and were made, the defendants well knowing that these pretenses...".

(A-40) The court deleted the names of the defendants as set forth in the original indictment and the "superseding information". A similar novation is noted in the courts reading of paragraph 8 of the "superseding information". (A-42)

The original counts 11 through 15 were for securities frauds. The court erroneously stated that the grand jury had incorporated by reference and re-allegation all the specifications contained in paragraphs 1 through 5 of counts 1 through 5 of "this superseding information". The grand jury in fact never presented a true bill on counts 6 through 15 as they were presented to the jury.

Lastly, the court in it's charge with respect to counts 6 through 15 stated that the "superseding information" repeats "...the same allegation with respect to having placed things in

the mail...". There is no allegation contained in the superseding information" as "...to having placed things in the mail...".

F. AIDING AND ABETTING

The crime of aiding and abetting requires a specific intent. A conviction may not be supported where a specific intent charge has been omitted. United States v. Bryant 461 Fed. 2d 912 (6th Cir. 1972). Under aiding and abetting the trial gave no specific charge as to a specific intent.

The court erroneously charged the jury that:

"therefore, it is not necessary for a conviction of a defendant on any of these counts that you find they did every or any act necessary to complete the offense."
(A-61)

Aiding and abetting requires an affirmative act. It differs from conspiracy in that the essence of aiding and abetting is participation while the essence of conspiracy is agreement. United States v. Varelle, 407 Fed. 2d 735 (7th Cir. 1969). The court's charge as given is a conspiracy charge, since it does not require any act necessary to make the venture succeed. Judge Learned Hand

in United States v. Pooni, 100 F. 2d 401, 402 (2nd Cir. 1938), said that the crime of aiding and abetting requires that the defendant "in some sort associate himself with the venture, that he participates in it as in something that he wishes to bring about, that he seek by his action to make it succeed". For this reason, the court's charge that the defendant need not perform any act to complete this offense is erroneous.

G. EXPERT TESTIMONY

The government offered Harvey Stack, a rare coin dealer as an appraiser and cataloger of rare coins. He was offered and qualified as a numismatic expert on rare coins.

Thereafter, he testified as an expert setting forth his opinions concerning the grading and evaluation of coins offered in evidence.

His testimony in these areas was crucial to the governments case.

However, in his charge to the jury the court made no mention of the standards to be applied

to the evaluation of his testimony as an expert.

This also constitutes "plain" error and requires a reversal.

H. CONCLUSION

The cumulative effect of the courts errors of ommission and commission in its charge to the jury constitute "plain" error.

POINT V

THE EVIDENCE AS PRESENTED
IN THE GOVERNMENT'S CASE
WAS INSUFFICIENT AS A MATTER
OF LAW TO DENY APPELLANT'S
MOTION TO DISMISS

The government offered 14 witnesses to the scheme and artifice to defraud by the appellant and his co-defendants. Each denied any knowledge of the identity and/or the existence of the appellant, Sol Rauch, with the exception of Barbara Wisniewski under Count 9 and Angelo Pieroni under Count 12.

Miss Wisniewski, an accountant from San Francisco, California, testified that on December 5, 1974, she spoke with a person who identified himself as Sol Rauch the attorney for Federal Coin and who stated that he would have an answer before 1:00 P.M. on December 6. This was the one and only contact she had with Sol Rauch. On the next day, at about 4:00 P.M. she received a phone call from a female who said that she worked for Federal Coin Reserve and told her that Mr. Rauch directed her to phone and advise Miss Wisniewski to expect a letter. Thereafter she re-

ceived a letter alleging that all coins had been located with one exception and requested further instructions as to what procedure was to be followed. In the meantime she wrote to Federal Coin Reserve requesting the return of her money rather than the coins.

Mr. Pieroni's contact with Sol Rauch occurred on December 30, 1974 outside a courtroom in the Southern District of New York. This was eighteen days after a restraining order had been issued against Federal Coin Reserve and the co-defendant. The appellant approached Mr. Pieroni, identified himself as the father of Marc Rauch and stated that he understood there was a dispute or disagreement with his son Marc concerning coins. Later that same day he and the appellant again discussed the coins when appellant agreed to arrange for the reimbursement of the \$5,000 which Pieroni had expended for the purchase of coins with the caveat that this agreement or understanding was in no way influenced by Mr. Pieroni's testimony which was scheduled before a District Court Judge later that day. In the following week Pieroni said he received a phone call from a female cancelling

his meeting with appellant. (R-1072-1190)

One other witness, testified that many months before he may have had a discussion with Sol Rauch concerning quality and quantity of coins to be furnished to the company, although he said "I cannot swear to it". (R-2632)

Al Cito, the office manager who was terminated in October 1974 testified concerning the physical layout of the office and the procedures followed in the operation of the business. He said that appellant occupied a desk in the corner of a large room with the co-defendants at ends on, either side of him. He further testified that the door was generally closed and did not know what occurred therein. He also testified concerning a meeting following a memorandum which he wrote about his frustrations in handling customers problems in a prompt fashion. (R-830-959)

He said that the appellant presided at and participated in that meeting and other meetings as well. However the operation of the business was fully and completely in the hands of the co-defendants.

The court, stated that the involvement of Sol Rauch is one that has caused him much concern. It appears to be a close question. The court indicated that there was no direct connection between Mr. Rauch and any of the witnesses other than on the one occasion when he spoke with Miss Wisniewski on the telephone as the attorney for the company and on the one occasion when he talked with Mr. Pieroni in the mens' room in the Southern District courthouse. The court stated that "he appears to have been, what might be described, as a top management level involvement financing of the company...he does not appear to have been involved directly in the purchase of coins and the sale of coins, the appraisal of coins, any particular promises to customers, nor any particular dealings with salesmen...he obviously participated in discussions which were the most important aspects of the operation of the business. The key question to me is whether he had knowledge of the alleged fraudulent misrepresentations which were being made by was of correspondence, brochures and telephone conversations". (R-2026)

The record is so sparse of any involvement, knowledge or specific intent on the part of Sol Rauch to participate in the scheme or artifice to defraud that the court erred in not granting his motion to dismiss at the end of the government's case. The court committed error in denying the motion to dismiss at the end of the entire case and in submitting the case to the jury for determination.

CONCLUSION

The judgement of conviction should be reversed and set aside, and the indictment dismissed against the appellant for the failure of the government to prove its case. In the alternative, a new trial should be ordered due to prosecutorial misconduct and plain error by the court.

Respectfully submitted,

BRADY, TARPEY, HOEY P.C.
Attorneys for Appellant
Sol Rauch

January 30, 1978

Joseph P. Hoey
Michael O'Sullivan
Richard D. Furlong

Of Counsel

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

against

SOL RAUCH, MARC RAUCH, LAWRENCE CORSA,
Defendants-Appellants,

and

MARVIN URBAN, a/k/a "MARTY GORDON",
Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON, being duly sworn, deposes
and says that he is over the age of 18 years. That on the 31st
day of January, 19 78 he served two copies of
Brief of Appellant Sol Rauch on
Hon. David G. Trager, U. S. Attorney, the attorney
for Appellee
by delivering to and leaving same with a proper person in charge of
his office at 225 Cadman Plaza East
in the Borough of Brooklyn, City of New York, between
the usual business hours of said day.

David F. Wilson

Sworn to before me this

31st day of January, 19 78.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1979

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Jack Kaplan, Esq., the attorney
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by delivering to and leaving same with a proper person in charge of
his office at 2 Wall Street
in the Borough of Manhattan, City of New York, between
the usual business hours of said day.

David F. Wilson

Sworn to before me this

31st day of January, 1978.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1978

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

against

SOL RAUCH, MARC RAUCH, LAWRENCE CORSA,

Defendants-Appellants,

and

MARVIN URBAN, a/k/a "MARTY GORDON",

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON

being duly sworn, deposes

and says that he is over the age of 18 years. That on the 31st
day of January , 1978 , he served two copies of the
Brief of Appellant Sol Rauch on
Donald E. Nawi, Esq.

the attorney for the Appellant Marc Rauch
by depositing the same, properly enclosed in a securely sealed
post-paid wrapper, in a Branch Post Office regularly maintained
by the Government of the United States at 90 Church Street, Borough
of Manhattan, City of New York, directed to said attorney at
No. 29 Iselin Drive, New Rochelle () N. Y.,
that being the address designated by him for that purpose upon
the preceding papers in this action.

David F. Wilson

Sworn to before me this

31st day of January , 1978.

Courtney J. Brown

COURTNEY J. BROWN

Notary Public, State of New York

No. 31-5472920

Qualified in New York County
Commission Expires March 30, 1979

